Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 80.

THE COUNTY OF STANISLAUS ET AL., APPELLANTS,

vs.

THE SAN JOAQUIN AND KINGS RIVER CANAL AND IRRIGATION COMPANY, APPELLEE.

REPLY BRIEF FOR APPELLANTS.

Appellee having filed two briefs, the appellants, before the conclusion of the argument, file the following reply:

NO JURISDICTION OF THIS CASE IN EQUITY.

Counsel for appellee is mistaken in saying, at page 70 of his main brief, that this point was not presented in appellants' argument in the circuit court. We produce on the argument in this court the printed argument in the circuit court of the County and its Supervisors on their demurrer to the bill of complaint, where the point was expressly urged that there was no jurisdiction in equity against them, since they could not, under the act of 1885, enforce the rate ordinance, and there was no allegation of their attempt to do so.

In *San Diego L. & T. Co. vs. Jasper*, 189 U. S., 439, the county was made a defendant by the water company, *and made no point as to jurisdiction*, and we do not see how that case can, as to this question, be considered as deciding anything more than that a water company having brought the county into a court of equity to defend a rate ordinance passed by its supervisors, and the county consenting to jurisdiction, such water company cannot afterwards insist that the county had no right to defend the suit.

The case of *Spring Valley Water Works vs. San Francisco*, 82 Cal., 286, cited by counsel, does not sustain him, because there the rate ordinance was passed by the supervisors of a city under the provisions of section 1 of article XIV of the constitution of 1879 of California, which expressly gives the city the right to forfeit the franchise of the water company should it not comply with the rates fixed by the municipal supervisors (p. 304). The case was decided on demurrer to the complaint, which alleged that the city was about to enforce the rate ordinance (p. 301). In California, water rates are fixed in cities or municipalities under the above constitutional provision, while in counties outside of cities they are fixed under the act of 1885.

In *Chicago Ry. Co. vs. Minnesota*, 134 U. S., 418, the Railroad Commission had power given it by statute to enforce the rates by mandamus (pp. 434–435), and what was there said by Mr. Justice Miller about the remedy was really not involved in the decision of the case. What the learned justice there said, however, is, we claim, authority for our contention that the "compendious remedy" of a suit in equity is not available where there is no commission or public official authorized to enforce the rates it may have fixed.

What was said by Mr. Justice Miller amounts to this, that a suit in equity to adjudge the rate void and enjoin its enforcement is the proper remedy, where there is opportunity under the principles of equity to resort to such remedy. That this must be so appears from the fact that, the language of the learned justice was quoted in *St. Louis & San Francisco Ry. Co. vs. Gill*, 156 U. S., 649, where the rates had been fixed by act of the legislature and no public commission or official charged with their enforcement, and where this court held that the validity of the rates could be decided *only* in an action at law by a passenger for the penalty. We fail to perceive wherein the case at bar differs in principle from the one last cited, where the rates were fixed directly by act of the legislature, with no authority given any public official to enforce them, for in the case at bar the rates are fixed by the supervisors under legislative authority and no public official is authorized to enforce them. In each instance, the enforcement of the rates is left to depend upon the will of the rate payer.

The Remedy at Law.

At page 39 of our opening brief we urge that the appellee had an adequate remedy at law in the right given it under the act of 1885 to apply to the supervisors to refix the rates.

Appellee, at page 71 of its main brief, says that this point was never brought to the attention of the court below. Counsel is mistaken, for on pages 173–174 of Mr. Stonesifer's printed argument for the county in the lower court the point was argued.

THE ACT OF 1862 IS VOID BECAUSE A SPECIAL ACT, IN VIOLATION OF SECTION 31, ARTICLE IV, OF THE CONSTITUTION OF 1849 OF CALIFORNIA.

We have dealt fully with this question in our opening brief (pp. 45–53). Counsel has not attempted to controvert our position or citations, which we claim to be conclusive. He has, however, at page 74 of his main brief, cited a number of cases from California which decide the general proposition that a classification will be sustained against the constitutional inhibition against special legislation where it is founded upon some natural or intrinsic distinction clearly apparent from the subject-matter and the law making the classification. But here, there obviously can be no natural or intrinsic reason why an irrigation company should not operate and have its rates fixed in the eleven counties excepted by the act of 1862 from its provisions. The exception of these counties was purely arbitrary and was clearly local and special legislation under the Californian decisions cited by us, which counsel has not, in any manner, criticised. It is certain that the constitutional provision in question, as construed by the supreme court of California, required all corporations, other than municipal, to be formed under *general laws*—that is, by laws as to *each kind or class of corporation* operating throughout the *entire State*.

THE RESERVED POWER OF THE STATE TO ALTER THE ACT OF 1862 AS TO RATES AND BASIS OF VALUATION.

As to this question, which is presented between pages 52 and 80 of our main brief, counsel cites the following decisions not before commented on by us:

In *New Orleans Gas Co. vs. Louisiana L. Co.*, 115 U. S., 650–670, an *exclusive contract*, permissible under the constitution and laws of the State, had been made between the city of New Orleans and the complainant, and such contract was sustained by this court against subsequent impairment by the city.

In *Los Angeles vs. Los Angeles Water Co.*, 177 U. S., 558, there was an *express lease and contract* by the city to and with the water company, with an agreement not to reduce the water rates below those then existing.

In *Stearns vs. Minnesota*, 179 U. S., 223, there was a grant of lands by the State to the railroad company to assist in building the railroad, made on the express condition that the railroad should not pay taxes on such lands, but that it should pay 3 per cent. of its gross earnings instead of taxes.

These were all cases of express contracts for valuable considerations moving to the State or city from existing corporations, and showing a clear intent that they should not be subject to alteration. Such cases are, as fully shown in our opening brief and the decisions there cited, distinguishable from the rate-regulating act of 1862 relied on by the appellee.

No Competent Proof of the Cost of the Canal.

This was discussed in our opening brief (pp. 85 to 90). In reply, counsel contents himself with citing the stipulation (Record, p. 459) that complainant's books of account "were correctly kept." But that does not mean that the alleged expenditures shown by the books *were actually made*, especially since it appeared that the secretary of the com-

pany merely entered in those books the expenditures made by and reported by other persons.

The Extravagant Cost of the Canal.

At page 89 of our main brief we claimed that it appeared from complainant's records in evidence that there had been great extravagance in constructing the canal. The evidence as to this matter referred to by us *is in this printed record*, as stipulated to by the former counsel for appellants and present counsel for appellee (Rec., pp. 464, 465). Now, counsel for appellee says, at page 76 of his main brief, that the evidence on this point now in the printed record, stipulated to by him, should not be considered because of an alleged verbal stipulation he claims to have made with the former counsel (now dead) for appellants. We, the present counsel for appellants, never heard of this alleged verbal stipulation until after our brief was printed, and we present the point as to extravagant construction solely upon the evidence we find in the printed record.

Discrimination of Complainant in Favor of Miller & Lux as to Irrigating Cultivated Lands.

In reply to our argument on this matter between pages 120 and 129 of our main brief, counsel says that the discriminating contracts are supported by adequate considerations. There is, first, the question as to whether or not an irrigation company *appropriating the public waters of the State of California* can dispose of such waters except at *money rates*, under the constitutional and statutory provisions cited at pages 143–144 of our main brief. The question has never

been decided by the supreme court of California, and when presented to that court we feel confident that money rates will be enforced as to all consumers. But, assuming for sake of argument that it is otherwise, it appears from this record that the entire consideration from Miller & Lux to complainant was exhausted in contract, Exhibit 5, which was made in 1872, before Miller & Lux obtained control of complainant's stock and board of directors (Rec., p. 122). In contract, Exhibit 6, made in 1879, after Miller & Lux got control of complainant, the water rate, not to exceed $1.25 per acre, was, *without any additional consideration*, given for 33,333.33 acres to "Miller & Lux, their tenants, employees, heirs, executors, and administrators, and shall run with the land so long as this company (complainant) exists" (Rec., p. 387). This important privilege was not contained in the former contract, Exhibit 5; and yet it is based upon the same considerations from Miller & Lux to complainant as set forth in Exhibit 5, viz., a grant of right of way and payment of $20,000 as a subsidy. Again, in the last contract, Exhibit 22, *without the slightest additional consideration whatever from Miller & Lux*, complainant agrees to let them have water *at one-half* the regular rates, not to exceed $1.25 per acre (Rec., p. 396). All of this while other consumers were compelled to pay $2 for one crop of cereals and $2.50 for alfalfa. So it appears, without the possibility of contradiction, from the record that, these discriminations in favor of Miller & Lux shown by Exhibits 6 and 22, over and above those rates and priveleges granted by Exhibit 5, are without any consideration whatever.

Discrimination in Favor of Miller & Lux as to Waste Water.

This is quite fully presented in our main brief (pp. 129 to 145), and has not been answered by counsel. We think we have clearly shown that complainant's canal has been operated mainly for the benefit of Miller & Lux ever since they obtained control of complainant corporation in 1877, and that, but for the manifest discriminations in favor of Miller & Lux, complainant's revenue would be greatly in excess of what it now is. In the face of such discriminations, a court of equity should not hold the public or supervisor's rates insufficient.

Respectfully submitted.

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For Appellants.